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No. 06-939

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.
Petitioners,

v.

EDMUND G. BROWN, JR., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the State of California's regulation of non-coercive employer speech about union organizing, California Assembly Bill No. 1889, Cal. Gov't Code §§ 16645.2, 16645.7, is preempted by federal labor law.

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This *amicus curiae* brief is submitted in support of petitioners.[1]

INTEREST OF AMICUS

The American Hospital Association (AHA) is a national not-for-profit association that represents the interests of nearly 5,000 hospitals, health care systems, networks, and other care providers, as well as 37,000 individual members. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it also advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed. Almost all hospitals in California that are members of the AHA receive Medi-Cal funding from the state in exchange for medical care that they provided to poor and other patients who meet the state's eligibility criteria. Receipt of those payments subjects the hospitals to AB 1889's restrictions on non-coercive employer speech about union organizing. The AHA therefore has a significant interest in the resolution of the question whether AB 1889 is preempted by federal labor law.

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or their counsel contributed monetarily to the brief.

SUMMARY OF ARGUMENT

California Assembly Bill No. 1889 ("AB 1889") is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(c), because it regulates non-coercive employer speech that Congress intended to insulate from state regulation.

A. This Court's cases establish that when Congress has focused on particular conduct and has refused to make that conduct unlawful under the NLRA, a state has no authority to regulate that conduct. Any state effort to regulate such conduct is preempted by Congress's decision to leave the conduct unregulated.

B. In Section 8(c) of the NLRA ("Section 8(c)"), Congress specifically focused on and refused to prohibit non-coercive employer speech about union organizing. A state therefore has no authority to regulate such non-coercive speech.

Section 8(c) reflects Congress's judgment that a fully informed decision by employees on whether to select a union is possible only when employers, as well as unions, have an opportunity to express their views. Section 8(c)'s purposes cannot be realized if unions are free to make the arguments they choose, while employers are effectively forced by the state to remain silent.

C. AB 1889 constitutes impermissible regulation of non-coercive employer speech and is therefore preempted. AB 1889 broadly prohibits any expenditure of state funds by an employer to influence an employee's decision on whether to select a union. That sweeping prohibition reflects the state's judgment that employer speech interferes with employee choice. Thus, the very speech that Congress viewed

as promoting informed employee choice, the state views as interfering with it. It is the very speech that Congress sought to encourage that the state seeks to stifle. The conflict between AB 1889 and federal labor policy could not be clearer.

AB 1889 also acts as a real deterrent to employer speech. It obligates employers that want to express their views on unionization to bear the substantial burden of establishing a segregated account containing non-state funds. It also requires such employers to maintain voluminous records that are sufficient to show that any money spent to speak on unionization was derived from a non-state source. It also invests unions with the power to file lawsuits that involve expensive discovery, and treble damages and attorneys fees for alleged violations. Those features of AB 1889 can effectively coerce an employer into silence during an organizing campaign.

D. AB 1889 is of particular concern for hospitals in California. First, hospitals, which employ a large and growing number of employees providing essential care for their communities, are frequently the subjects of union organizing drives. Second, virtually all hospitals in California receive state reimbursement for poor and other patients who meet the eligibility criteria for the state's Medi-Cal program. This combination of circumstances puts hospitals at the center of this controversy over employer free speech.

At the same time, hospitals are perhaps the least equipped to withstand the financial burden that AB 1889 imposes through its requirements for segregated accounts and heightened recordkeeping. Even though almost all hospitals in California provide

care for the poor through the Medi-Cal program, the state reimburses hospitals less than their costs for providing care to Medi-Cal patients. AB 1889's costly record-keeping and other administrative requirements significantly exacerbate that burden.

When hospitals are deterred by the state from communicating to their employees about the appropriate hospital-employee relationships within their community, it is not just the hospitals that are adversely affected. The employees who lack the information necessary to make a fully informed choice also are harmed.

E. There is no basis for the court of appeals' holding that regulation that takes the form of a restriction on the use of state funds is not preempted. Under this Court's cases, a state may no more regulate in the labor field through a funding restriction than it may regulate in any other way.

There are good reasons to adhere to that principle here. A use restriction that is implemented by requiring an employer to undergo the substantial burden of creating a segregated private account and maintaining detailed records can be just as effective as any other kind of regulatory restriction in deterring employer speech. That restriction is compounded when unions are permitted to file lawsuits seeking treble damages and attorneys' fees for alleged violations.

Moreover, AB 1889 does not take the form of a neutral requirement that funds must be spent to further the purposes of a program. Instead, AB 1889 targets only employer speech on unionization in order to further the state's judgment that such speech interferes with employee choice. Underscoring its

lack of neutrality, AB 1889 expressly permits the use of state funds to advance pro-union objectives, such as the negotiation of agreements to recognize a union without a secret ballot election. Basic preemption principles preclude a state from leveraging its funds to promote its own labor policy, particularly when that state policy so clearly conflicts with the federal labor policy reflected in the NLRA.

ARGUMENT

AB 1889 IS PREEMPTED BECAUSE IT REGULATES NON-COERCIVE EMPLOYER SPEECH THAT CONGRESS INTENDED TO LEAVE UNREGULATED

A. The National Labor Relations Act Preempts State Laws That Regulate Conduct That Congress Intended To Leave Unregulated

This case is governed by the Court's repeated holdings that the National Labor Relations Act (NLRA) preempts state laws that regulate conduct that Congress intended to leave unregulated. The Court's decisions in *Teamsters v. Morton*, 377 U.S. 252 (1964), *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986), establish the scope of that preemption principle.

In *Morton*, the Court held that the NLRA preempted a state law that prohibited a peaceful secondary boycott that the NLRA did not prohibit. The Court explained that if a state law could "proscribe the same type of conduct which Congress focused on

but did not proscribe . . . the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." *Morton*, 377 U.S. at 259-60.

In *Machinists*, the Court held that the NLRA permits employees to refuse to work overtime and that a state law that penalized that tactic was therefore preempted by the NLRA. 427 U.S. at 149-50. The Court reasoned that the state lacked authority to deny "one party to an economic contest a weapon that Congress meant him to have available." *Id.* at 150 (citation and internal quotation marks omitted).

And, in *Golden State Transit*, the Court held that a city could not condition a taxi license on a company's settlement of a strike. The Court explained that Congress intended to permit employers to respond to an employees' strike by resisting it, and that the city's action interfered with that congressional policy choice. 475 U.S. at 618.

Morton, *Machinists*, and *Golden State Transit* establish a clear rule for determining the preemptive scope of the NLRA. When Congress fails to make certain conduct unlawful under the NLRA, it not only intends to insulate that conduct from the control of the National Labor Relations Board ("Board"), but also intends to insulate it from state regulation. As the Court has explained, Congress's failure to make certain conduct a violation of the NLRA warrants the inference that Congress intended for the conduct "to be left for the free play of contending economic forces." *Machinists*, 427 U.S. at 141 n.4. Moreover, "[t]he States have no more authority than

the Board to upset the balance that Congress has struck." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751 (1985).

B. Congress Intended That Employers Have The Opportunity To Engage In Non-Coercive Speech About Union Organizing Without Interference From A State

In the NLRA, Congress declined to prohibit non-coercive speech by employers about union organizing. Accordingly, under this Court's decisions in *Morton*, *Machinists*, and *Golden State Transit*, a state also lacks authority to regulate such non-coercive employer speech.

Section 8(c) is the source of Congress's protection for non-coercive employer speech. It provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). That provision reflects Congress' judgment that national labor policy requires that employers, as well as unions, have an opportunity to engage in non-coercive speech on the subject of unionization.

Indeed, prior to the enactment of Section 8(c), the Board had interpreted the NLRA to require employers to remain neutral during a union organizing campaign. *See Letz Mfg. Co.*, 32 N.L.R.B. 563, 571-572 (1941). After this Court held that the NLRA only bars employer speech that is coercive, *see NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941), Congress enacted Section 8(c) to "insure both to employers and labor organizations full freedom to

express their views to employees on labor matters." S. Rep. No. 80-105, at 23-24 (1947). In revising the NLRA, "Congress necessarily decided not only what coercive tactics should be forbidden, but what methods of persuasion should be permitted employers seeking to induce their employees not to join a union." Archibald Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972).

Section 8(c) "manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966). Consistent with that purpose, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Congress protected non-coercive employer speech because it viewed such speech as critical to achieving the NLRA's goals. That protection not only reflects Congress's interest in giving both employers and unions an opportunity to make their case during an organizing drive. It also reflects Congress's judgment that the exchange of views promotes an informed decision by employees on whether to select a union. The NLRA seeks to establish the conditions for employees to make a "free and reasoned choice" on whether to unionize, and "such a choice" is "undoubtedly" imperiled when employees lack information "with respect to one of the choices available." *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240 (1966). When employees are allowed to hear only one side of the story, a fully informed decision is not possible.

In fact, the NLRA incorporates the principle that debate "should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks." *Linn*, 383 U.S. at 62 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The NLRA accordingly does not authorize the Board to "police or censor propaganda" unleashed in an organizing campaign, but instead leaves "to opposing parties the task of correcting inaccurate and untruthful statements." *Linn*, 383 U.S. at 60 (quoting *Stewart-Warner Corp.*, 102 N.L.R.B. 1153, 1158 (1953)).

That method of facilitating an informed choice by employees on whether to select a union cannot work as Congress intended when only one side to the debate is free to speak. By enacting Section 8(c), Congress ensured that employers would have the opportunity to participate fully in these discussions on unionization, free of interference from others, including the state.

C. AB 1889 Impermissibly Regulates Non-Coercive Employer Speech On Union Organizing

1. AB 1889 establishes a state policy on employer speech on union organizing that is directly opposed to Congress's judgment that such speech facilitates a reasoned decision by employees on whether to organize and is therefore to be encouraged. Based on the state's view that employer speech that is supported by state funds "interferes with an employee's choice about whether to join or to be represented by a union," the statute prohibits employers that receive identified state funds from using them "for the purpose of influencing employees to support or oppose

unionization." 2000 Cal. Stat. ch. 872, § 1.

AB 1889 casts its regulatory net over a wide range of employers. Covered employers include any private employer that receives "a grant of state funds," as well as any private employer that receives more than $10,000 per year "on account of its participation in a state program." Cal. Gov't Code §§ 16645.2(a), 16645.7(a). The latter group includes hospitals that participate in the state's Medi-Cal program, under which the state reimburses health care providers after they have furnished needed health care services to poor and other patients who meet the state's eligibility requirements.

The statute also erects a sweeping prohibition on employer speech. It prohibits any covered employer from using state funds to "assist, promote, or deter union organizing," and it broadly defines those terms to encompass "*any attempt* by an employer to influence the decision of its employees" regarding "[w]hether to support or oppose a labor organization" or "[w]hether to become a member of any labor organization." Cal. Gov't Code § 16645(a) (emphasis added). The statute also specifies that it applies to "*any* expense, including legal and consulting fees and salaries of supervisors and employees, incurred for . . . an activity to assist, promote, or deter union organizing." Cal. Gov't Code § 16646(a) (emphasis added).

Thus, the very speech that Congress viewed as promoting employee choice, the state views as interfering with that choice. And the very speech that Congress sought to encourage, the state seeks to curtail. It is difficult to imagine a clearer conflict between state and federal labor policy.

2. Furthermore, AB 1899 tilts the playing field decidedly in the direction of unionization. The statute targets only employer efforts to influence employees, not the efforts of unions, thereby favoring one set of speakers over the other.

Beyond that, while the statute creates a categorical bar on the use of state funds to dissuade employees from joining a union, it allows employers to use state funds to engage in a number of what generally would be considered pro-union activities. For example, AB 1889 authorizes employers to use state funds to give unions access to the workplace, Cal. Gov't Code § 16647(b), and it allows employers to use state funds to voluntarily recognize a union without the conduct of a secret ballot election, *id.* § 16647(d). The state's policy to skew the debate in favor of unionization is flatly inconsistent with congressional policy "to encourage free debate on issues dividing labor and management." *Linn*, 383 U.S. at 62.

3. AB 1889 does not just establish a different policy on employer speech on the subject of unionization than Congress established. It acts as a strong deterrent to employer speech.

For those employers that are wholly dependent on state funds, AB 1889 operates as a flat ban on non-coercive employer speech. *See* Pet. Br. 43 (noting that 500 employers receive all of their funding from Medi-Cal). Such employers must simply remain silent during organizing drives.

Employers that receive funds from non-state sources may not face an equivalent flat ban on speech about unionization, but they do face formidable barriers if they decide to enter that debate.

a. First, the statute requires an employer wish-

ing to express a view on unionization to bear the substantial burden of creating a segregated fund that consists entirely of funds that are derived from non-state sources. A segregated fund is necessary because AB 1889 presumes that money spent from a commingled fund for the purpose of informing employees about unionization includes state money, thereby making the expenditure unlawful. Cal. Gov't Code § 16646(b) (allocating expenses from a commingled fund on a pro rata basis).

An example illustrates why a segregated fund is necessary. Suppose an employer spends $10,000 to express its views on unionization from a commingled account that consists of $50,000 in state funds and $50,000 in private funds. Although the employer had sufficient private funds to cover the $10,000 expense, AB 1889 would presume that half of the expenditure came from state funds and that the employer therefore violated the statute. Cal. Gov't Code § 16646(b). The only way for an employer to avoid that automatic attribution rule is to put money from private sources in a segregated account, and draw the money to inform employees about unionization from that private account.

b. AB 1889 imposes another serious burden on employers that wish to inform their employees on the subject of unionization: It requires such employers to maintain voluminous records to demonstrate that any money spent was derived from a non-state source. Cal. Gov't Code § 16645.2(c). The breadth of the statute and the realities of the workplace make that a daunting task.

For example, if an employer wants a human resource manager to devote a portion of each day dur-

ing an organizing drive to union-related activities, it must be prepared to document that it paid the manager for each of those discrete time periods from a segregated private account. Similarly, if an employee asks a supervisor a question on the benefits of a union, and the supervisor answers it, the employer apparently would have to maintain records that document that it paid for the time devoted to that one conversation from a private segregated fund.

Even the distribution of flyers to employees on the subject of unionization can involve burdensome recordkeeping. If an employer directs one of its employees to compose and mail out flyers, the employer would have to maintain records documenting that it used money from a private account to pay for the employee's time, and possibly even the paper on which the flyers appeared, the envelopes into which the flyers were placed, and the stamps that were fixed to the envelopes. Indeed, if computers, phones, fax machines, and photo copiers were used to produce and distribute the flyers, the employer presumably might be required to document that it used money from a private account to pay for the share of the equipment and utility costs attributable to that activity.

c. In addition to costly and burdensome recordkeeping and other administrative requirements, the state law authorizes the California Attorney General or any taxpayer, including a union, to sue to enforce the statute. Cal. Gov't Code § 16645.8(a). For violating the law, a court may award treble damages to the state—the amount of money spent that could not be documented as coming from a segregated private fund, plus a civil penalty of twice that amount. *Id.* §§ 16645.2(d), 16645.7(d). A prevailing private

party, including a union, also may collect attorney's fees. *Id.* § 16645.8(d). These penalties will act as a serious deterrent to hospitals because they threaten to sap needed funds from patient care and quality improvement.

d. In combination, the statute's requirement of a segregated fund, its voluminous recordkeeping requirements, and its threat of a significant financial penalty for violation of the legal requirements can effectively coerce an employer into silence. Because that conflicts with Congress's judgment that employers should be able to express their views on unionization without interference from a state, AB 1889 is preempted. As the original panel in this case reasoned, AB 1889 is preempted because it "directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process." Pet. App. 127a.

D. AB 1889 Has Particularly Pronounced Adverse Effects On Hospitals

California hospitals are disproportionately affected by AB 1889's requirements. In particular, as discussed below, with the growth in the health care field, unions have frequently sought to organize hospital workers. At the same time, hospitals, including those in California, are committed to caring for everyone in the communities they serve, including those who are unable to pay for their care because they are poor. Toward that end, nearly all hospitals in California receive Medi-Cal reimbursement for caring for poor and other patients eligible for that program. Accordingly, at the very time when hospitals may be called upon to express a view on unionization, their

receipt of Medi-Cal and other state funds subjects them to AB 1889's severe restrictions on such speech. Those burdens are exacerbated because Medi-Cal does not fully reimburse hospitals for caring for poor and other eligible patients.

1. The health care field is the largest supplier of jobs in the United States. As of 2006, it provided approximately 13.6 million jobs for wage and salary workers, 40% of which were in hospitals. *See* Bureau of Labor Statistics, U.S. Department of Labor, *Career Guide to Industries: Health Care, 2008-2009 Edition*, http://www.bls.gov/oco/cg/cgs035.htm (last visited Jan. 15, 2008).

As the number of wage and salary jobs in the health care field has increased, unions have more frequently sought to organize health care workers. In 1995, only 8.6% of the total number of the representation elections occurred in the health care field. 60 NLRB Ann. Rep. 152, 168 (1995). By 2004, 16.2% of the representation elections occurred in health care. 69 NLRB Ann. Rep. at 234, 253 (2004). During that period, the number of representation elections in health care increased by more than 50%, whereas the total number of elections declined by 20%. 60 NLRB Ann. Rep. 168; 69 NLRB Ann. Rep. 253.

2. Given that providing care for their communities regardless of a patient's ability to pay is at the core of a hospital's mission, virtually all hospitals in California provide services for the poor and uninsured and, as a result, receive state funding through the Medi-Cal program to help compensate them for those services. 98% of the state's 314 acute care hospitals receive Medi-Cal reimbursement for caring

for poor and other patients who qualify for hospital care and services through the program. California Office of Statewide Planning & Development, *Hospital Annual Financial Data*, http://www.oshpd.ca.gov/HID/Products/Hospitals/AnnFinanData/ (last visited Jan. 15, 2008) (follow "Query Tables" hyperlink; then follow "2006" hyperlink to the data set).

For many California hospitals, Medi-Cal is a major source of operating funds: nearly one-third of acute care hospitals receive 20% or more of their gross patient revenue from Medi-Cal funds, and 8% of acute care hospitals receive 40% or more of their gross patient revenue from that source. *Id.*[2]

For a majority of hospitals in California, caring for Medi-Cal eligible patients is not only consistent

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[2] Hospitals also participate in several other state funding programs that would trigger AB 1889's stringent restrictions on employer speech, including Disproportionate Share Hospital payments, Cal. Welf. & Inst. Code § 14105.98 (supplemental funds for hospitals that have a disproportionate share of Medi-Cal patients); California Children's Service program, Cal. Health & Safety Code §§ 123805, 123830 (services to children with physical limitations and chronic health conditions); Healthy Families Program, Cal. Ins. Code § 12693 *et seq.* (for children who are uninsured and ineligible for Medi-Cal); Private Hospital Supplemental Fund, Cal. Welf. & Inst. Code § 14166.12 (emergency services, medical education, teaching hospitals, and small and rural hospitals); Construction and Renovation Reimbursement Program, Cal. Welf. & Inst. Code § 14085.5(b)(1)(A) (reimbursement for debt service on revenue bonds for new or renovated facilities or fixed equipment); Distressed Hospital Fund, Cal. Welf. & Inst. Code § 14166.23 (financial support for hospitals treating a substantial volume of Medic-Cal patients and facing significant hardships); and Genetically Handicapped Person Program, Cal. Health & Safety Code § 125125 *et seq.* (reimbursement for the care of adults with specific genetic diseases).

with their mission and an important source of their revenue, it is legally mandated as a result of their tax exempt status. 265 of the 382 California hospitals that report data to the state's Office of Statewide Health Planning and Development are not-for-profit hospitals. California Office of Statewide Planning & Development, *Hospital Annual Financial Data*, *supra* (follow "Pivot Profiles" hyperlink to data set). Under Section 501(c)(3) of the Internal Revenue Code, tax-exempt hospitals must provide care to all persons in the community able to pay through third-party payers, such as Medi-Cal. Rev. Rul. 69-545.

3. While Medi-Cal is a critical source of operating revenue for California hospitals, it does not fully reimburse hospitals for the cost of caring for Medi-Cal patients. Currently, Medi-Cal pays, on average, only 83 cents for every dollar of care provided. California Office of Statewide Planning & Development, *Hospital Annual Financial Data*, *supra* (follow "Pivot Profiles" hyperlink to data set). Thus, the substantial burdens and costs that AB 1899 imposes on hospitals through its fund segregation and record-keeping requirements, in addition to the law's threat of significant financial penalties for violating its requirements, may make it difficult for a hospital to find the funds necessary to comply with the law's requirements, if that hospital chooses to exercise its right under federal law to participate in discussions about unionization.

4. Because the overwhelming majority of California hospitals depend on Medi-Cal as a source of funding, they would have no choice but to comply with AB 1889's costly requirements if they wish to participate in the discussion about unionization.

The costs of such compliance and potential consequences of any infraction of AB 1889's requirements are such that many hospitals will be effectively deterred from taking part in these discussions.

The consequences of such silence are troubling. Hospital employees, ranging from nurses to janitorial staff, will be deprived by the state of the benefit of a full and robust discussion about the benefits and detriments of unionization. Instead, they will hear only one side. Hospitals, like other employers that are largely dependent on state funding, will be deprived of an essential right of communication that Congress sought to preserve through the NLRA. The state does not, nor should it, have the power to dictate such an unfair outcome.

E. The Court Of Appeals Erred In Holding That A State May Regulate Non-Coercive Employer Speech On Union Organizing As Long As It Does So Through A Restriction On The Use Of State Funds

1. The court of appeals understood that AB 1889 constitutes a state regulatory measure in the field of labor relations and that such regulatory measures are ordinarily preempted. It nonetheless held that the state could undertake such regulation because AB 1889 takes the form of a restriction on the use of state funds.

Under this Court's NLRA preemption decisions, however, what matters is "the nature of the activities which the states have sought to regulate," not "the method of regulation adopted." *Golden State*, 475 U.S. at 614 n.5. Just as a state many not directly regulate non-coercive employer speech about unionization through a direct prohibition because

Congress intended for such speech to be unregulated, a state may not indirectly regulate such conduct through a state funding restriction. Here, as in other contexts, a state may not seek to accomplish indirectly what it is forbidden from achieving directly.

The Court's decision in *Wisconsin Dep't of Industry, Labor & Human Resources v. Gould*, 475 U.S. 282 (1986), is controlling on this point. There, the Court invalidated a state's refusal to contract with any firm that had repeatedly violated the NLRA. The Court explained that because the state's funding restriction was designed "to deter labor law violations," it was "tantamount to regulation" and therefore preempted. *Id.* at 287-289. That the state sought to enforce its preferred policy through its spending power, rather than its police power, was a "distinction without a difference." *Id.* at 287.

The Court subsequently held that the NLRA does not have a preemptive effect when a state acts as a proprietor rather than a regulator. *Bld'g & Construc. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 227 (1993). In particular, the Court held that the NLRA did not prevent a state agency supervising a construction project from requiring that contractors abide by a labor agreement in order to ensure completion of the project as quickly as possible at the lowest cost. *Id.* at 230-231.

In this case, however, the state acted in its regulatory, not its proprietary, capacity. As the court of appeals explained, the state did not enact AB 1889 to achieve the efficient delivery of goods or services; it enacted AB 1889 to implement its preferred labor policy. Pet. App. 11a-12a. The market participant

exception to NLRA preemption is therefore inapplicable, and *Gould*'s holding that a state may not seek to achieve regulatory objectives through a funding restriction is controlling.

2. The court of appeals sought to distinguish *Gould* on the ground that AB 1889 does not make employer silence a condition for "receiving" state funds, but instead restricts only the "use" of state funds. Pet. App. 17a. According to the court, the distinction between the two is that when a state imposes a use restriction rather than a receipt restriction, "an employer has and retains the freedom to spend its own funds however it wishes." *Id.* The court also concluded that a use restriction permissibly furthers the state's interest in ensuring that its funds are spent for the purposes for which they were given, and that such a use restriction therefore should be recognized as a new exception to the NLRA's normal preemption principles. *Id.* at 31a-32a.

The court's line between "use" restrictions and "receipt" restrictions does not withstand analysis, and the court's proposed new exception to NLRA preemption should be rejected for several reasons. First, use restrictions can be just as effective in compelling employer silence. As previously discussed, for employers that are wholly dependent on state funds, AB 1889 operates as a flat ban on noncoercive employer speech on union organizing. *See* Pet. Br. 43. Even for employers that have other sources of funding, AB 1889's requirement of a separate account, its burdensome recordkeeping requirements, and its threatened significant financial penalty operate as a strong deterrent to engaging in such speech.

Second, AB 1889 adopts an expansive definition of state funds that includes funds that are not ordinarily viewed as state funds after their receipt. In particular, AB 1889 bars hospitals from spending money they have received from the state for services the hospitals have already provided to particular Medi-Cal eligible patients. Money received as part of such an exchange for services rendered ordinarily is viewed as the money of the recipient, not that of the entity making the payments. For example, when a state pays an employee a salary for services already rendered, the money is commonly understood to belong to the employee, not the state. The same is true when the state pays hospitals for services they provide. In imposing limitations on the use of those funds, the state seeks to restrict how hospitals spend what would ordinarily be regarded as their money, not the state's.

Third, AB 1889 also has a direct impact on how employers use funds from private sources. In particular, AB 1889 requires an employer wishing to speak on unionization to put such *private* funds in a separate segregated account, and to maintain voluminous records on how such *private* funds are spent. And, by making employers liable for treble damages and attorney's fees for any failure to provide sufficient documentation of these expenses, AB 1889 can effectively chill employers from using even such *private* funds to speak about unionization.

Finally, AB 1889 does not take the form of a neutral requirement of general applicability that funds received from the state be spent only for program-related purposes. Rather, AB 1889 targets only an employer's expenditures on the subject of unionization, leaving unregulated all expenditures by unions

as well as other employer expenditures on labor costs. The selective and discriminatory nature of AB 1889 shows that the statute is not designed neutrally to further the state's interest in ensuring that state funds are used for program-related purposes. Instead, as previously discussed, AB 1889's express targeting of employer speech shows that it is designed to further the state's policy judgment that non-coercive employer speech interferes with the free choice of employees and therefore should be inhibited—a judgment that directly conflicts with Congress's judgment that non-coercive employer speech supports informed decisions by employees on whether to form a union and therefore should be encouraged. Whether framed as a use restriction or a receipt restriction, basic preemption principles preclude a state from leveraging its funds to promote a labor policy that so clearly conflicts with the national labor policy reflected in the NLRA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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